SUPREME COURT, U.S.
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No. 94-980

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

CITY OF LOS ANGELES, a Municipal Corporation and Public Entity of the State of California,

Petitioner,

vs.

THANE CARL CHEW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT THANE CARL CHEW IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE V. DENNY, III
Counsel of Record
11130 Cashmere Street
Los Angeles, CA 90049
(310) 476-4916

RALPH J. LEARDO
Attorney at Law
500 Sansome St., #614
San Francisco, CA 94111
(415) 362-1212

ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Where a plaintiff sues a police officer and his employing city, alleging that the officer is liable both for using a police dog to attack and bite the plaintiff, and for beating and kicking the plaintiff himself, does the satisfaction of a judgment against the officer preclude an appeal from a summary judgment in favor of the city, where distinct constitutional wrongs were alleged against each defendant, and it cannot be determined from the general verdict whether the jury compensated plaintiff for the dog bites, or simply for the beating by the officer?

2. Can a city's policy of using police dogs to find, attack and bite a suspect every time the dogs get out of sight of their handlers, regardless of whether the suspect poses a threat or is trying to surrender, subject the city to liability for a dog attack, either on the basis of a determination that the seizure was unreasonable and the attack occurred pursuant to the policy, or that the policy itself was unconstitutional?

LIST OF PARTIES

Respondent Thane Carl Chew was plaintiff and appellant in the courts below. Petitioner City of Los Angeles was a defendant and appellee in the courts below. Daryl Gates, Donald Yarnall, Mark Mooring and Patrick McKinley were defendants and appellees in the courts below, where they obtained favorable judgments, and are not parties before this Court. Daniel Bunch was a defendant in the trial court, where a judgment was entered against him which has been satisfied. He was not a party to the appeal below.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

CITY OF LOS ANGELES,

Petitioner,

vs.

THANE CARL CHEW,

Respondent.

Respondent Thane Carl Chew respectfully submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinions of the court of appeals are reported at 27 F.3d 1432, and are reproduced in Appendices A and B to the petition. The opinion of the district court is reported at 744 F. Supp. 952 (C.D. Cal. 1990).

JURISDICTION

Respondent agrees that this Court has jurisdiction. However, Respondent objects to Petitioner's mis-characterization of the nature of the decisions below, as fully explained hereinafter.

STATEMENT OF THE CASE

This case involves the right of Plaintiff Thane Carl Chew to pursue a claim for damages against the City of Los Angeles for dog bites inflicted on him during his arrest. Plaintiff sued the arresting officer, the City and supervisory personnel under 42 U.S.C. § 1983, alleging the use of excessive force in both the use of the dog, which nearly resulted in the loss of his arm, and an assault by the arresting officer, which resulted in various lacerations to his head. The district court granted summary judgment in favor of the dog trainers and police chief on the grounds of qualified immunity, and in favor the City on plaintiff's *Monell*[1] claim pertaining to the policy regarding the use of dogs on the grounds that the seizure was reasonable as a matter of law. The case then proceeded to trial against the arresting officer alone. Following a general verdict, judgment was entered against the officer in the amount of $13,000, which the City has paid on behalf of the officer. Plaintiff appealed the denial of summary judgment against the City and other defendants. The court of appeals affirmed the summary judgment in favor of the individual defendants, but reversed and remanded for a trial on the City's *Monell* liability.

On September 4, 1988, Chew was stopped by a Los Angeles police officer for a minor traffic violation. CR 39.[2] While the officer was running a "make" on him, Chew fled on foot and hid in a nearby junkyard. Upon learning that

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[1] *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

[2] The facts relating to the incident are taken from the pretrial order, because Petitioner has raised a question which relates to the effect of the jury's verdict following a trial. Since plaintiff appealed a summary judgment in favor of the City, a trial transcript was not ordered. Contrary to what Petitioner charges, it was not plaintiff's responsibility to do so.

there were three outstanding warrants for Chew's arrest, the officer called for assistance.[3] A perimeter was set up around the junkyard, and several canine teams, including Officer Bunch and his dog, as well as a helicopter, were called in to search for Chew. After an extensive search of nearly two hours, Bunch's dog finally located Chew hidden between two dumpsters. At the time, it is undisputed that the dog had been unleashed to find Chew, and was out of sight of his handler. Id.

Plaintiff alleged that when he saw the dog approaching, he called out that he surrendered and to call the dog off. He alleged that he then heard a voice say, "Get 'em," at which point the dog attacked, biting him first in the side, then in the upper arm, and finally in the lower arm, tearing out a huge chunk of flesh and nearly severing the arm. CR 1, 39. Plaintiff further alleged that when Bunch arrived, the officer kicked him in the head and hit him a number of times about the head and body with his baton, opening various cuts in his head. CR 39.

Bunch alleged that when he came upon the plaintiff and the dog who were between the dumpsters, plaintiff was striking the dog with a metal pipe or rod, and that he therefore lowered himself down and kicked at the plaintiff to "disarm" him. Bunch also contended that the various cuts on plaintiff's head were caused by scraps of metal as the dog was attempting to pull Chew from his hiding place. Id. It is

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[3] As noted in the opinion of the Court of Appeal, it is undisputed that at the time the search was conducted, none of the officers was aware of the reason for the warrants, except that they were for "felonies." Appendix A, Petition for Writ of Certiorari (Pet. App.A) at A57. Defendants conceded this was the case in their brief in the Court of Appeal and at oral argument. Thus, Petitioner's belated attempt to enhance the record by reciting that the warrants were for "burglary" is unavailing.

undisputed that Chew sustained severe lacerations to his left side and left forearm, and lacerations to his head.

Plaintiff sued Los Angeles police officer Daniel Bunch, Police Chief Daryl Gates, Captain Patrick McKinley, Sergeant Mark Mooring and Officer Donald Yarnall for damages resulting from the use of excessive force during his arrest. Bunch's liability was predicated both on his use of a police dog to attack and bite Chew, and upon his kicking Chew in the head and beating him with his baton. CR 1. The liability of the other individual defendants was predicated upon their responsibility for training the dogs to always attack and bite even non-resistant, passive suspects who were trying to surrender, and the City's liability was premised on its implementation of the training policy. Id. Plaintiff's first amended complaint alleged that the City's policy makers had promulgated and implemented a policy which

> Required, encouraged or condoned the training of police dogs to attack and bite unarmed, non-resistant human suspects, knowing that severe injury to said suspects was likely to occur as a result thereof, and knowing that the dogs could be trained so that they would not bite citizens who were offering no resistance or harm.

CR 1, para. 18(b).

Beginning in about 1983, LAPD dogs, including the one that attacked plaintiff, had been trained to "find and bark," i.e., to alert the handler by barking when they found a suspect, but not to automatically bite. This method was thought to be safer for the handler. Mooring Deposition at 44-47;[4] Yarnall Deposition at 97. That policy was

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[4] While McKinley stated that "find and bite" was "safer" for the

abandoned in late 1987 or early 1988 in the face of arguments that the dog needed a "reward" to enforce its hunt instinct, the reward being the "fight" or "bite," and arguments that since the dog would bite if the suspect moved at all, then the City was likely to be sued anyway. Mooring Deposition at 59-66; McKinley Deposition at 43-48. Under the new policy, the desired goal was to have the handler stay close to the dog, but in "many, many cases" the dogs *would* get out of sight of their handlers, and it was impossible to instruct the handlers *not* to let the dogs get out of their sight. Mooring Deposition at 64. If a dog was sent out to find a suspect and did get out of sight of its handler, upon finding the suspect the dog was trained to *attack, bite hard, hold and even drag the suspect to the handler, unless earlier called off*, even if the suspect was stationary, passive and offered no resistance. Yarnall Deposition at 60-61; Mooring Deposition at 43-44; Bunch Deposition at 26-27.[5]

All defendants except Bunch moved for summary judgment, arguing that the policy of using dogs to "find and seize felony suspects who refuse to surrender" was "not clearly unconstitutional." CR 9. The defendants conceded, for purposes of summary judgment, that departmental canine

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"community," that depended upon the officer being "very close" to the animal so that he could control it, and he agreed that this method was in fact more dangerous for the *officer*. McKinley Deposition at 36, 39; See Pet. at 36-38. McKinley Deposition at 36. In this case, Bunch was nowhere near his dog when it located plaintiff.

[5] McKinley's testimony, cited by Petitioner, that the dogs were trained *not* to bite under these circumstances is flatly contradicted by the trainers and the handler themselves. It also contradicts his own testimony that the dog needs the reward of a bite to be effective. See Pet. at 39. Petitioner's reference to Mooring's testimony indicating that a dog would not necessarily bite *every time* it found a suspect is irrelevant, since it is only the situations where the dog is *out of sight of the handler* that was involved in this case. See Pet. at 31.

policy authorized the seizure of all concealed suspects, whether they resisted or not, by dogs trained to bite hard and hold, and that Chew was indeed attempting to "peacefully surrender once he realized he was found." CR 16. Defendants' memorandum of points and authorities in support of the motion stated that "Volker found the suspect and seized [plaintiff], as he was trained to do." CR 9.

In an opinion and order entered August 31, 1990, the district court granted summary judgment for all defendants except Bunch, holding that the individuals with responsibility for the dogs' training had qualified immunity, and that the City could not be liable because the seizure by the dog was objectively "reasonable" as a matter of law. CR 25; 744 F. Supp at 956.[6]

The court of appeals first held that Chew's claims were not moot because the three constitutional wrongs which had been alleged against Bunch (releasing the dog, ordering the dog to attack plaintiff after he attempted to surrender, and beating and kicking plaintiff as the dog was biting him) were distinct from those alleged against the other defendants, including the City (training and using police dogs in an unconstitutional manner). Pet. App.A at A23-A25. The court further held that Chew could obtain some form of relief on his claims against the City, first because nominal damages are available to him, and second because, in view of the fact that a general verdict was rendered, it could not be ascertained with any assurance that Chew had been compensated for the dog bites, and thus, for purposes of collateral estoppel, it had to be presumed that he was not. Pet App.A at A25-A31.

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[6] While the motion itself appears to argue that all defendants, including the City, were entitled to qualified immunity because the policy was "not clearly unconstitutional," the district court addressed the City's liability in terms of whether the seizure was reasonable, and thus whether a constitutional violation had occurred.

The court also held that it was legally possible to assume that the jury found Bunch not liable for the dog bites and at the same time to hold the remaining defendants liable for them. This challenge, the court held, was "easily met," because the jury could have concluded that it was reasonable for Bunch to release his dog, given the fact that the procedures adopted by the City left him with no other means of apprehending the suspect that involved less risk of bodily injury to himself or the suspect, and still find the City liable for implementing an unconstitutional policy, or for failure to train or supervise properly.[7] Pet. App.A at A31-A35. Moreover, the court noted, *the jury may have exonerated Bunch from liability for the dog bites on the grounds of qualified immunity, a defense which does not apply to the City.*[8] Pet. App.A at 34-35. Thus, the court concluded that the satisfaction of the judgment against Bunch did not bar Chew from pursuing his claims against the City.

As to the merits of the appeal of the summary judgment for the City, the court noted first that Chew had advanced two distinct theories of *Monell* liability:

> First, he contends that Officer Bunch violated his Fourth Amendment right not to be subjected to the use of excessive force by unreasonably releasing Volker and that *Bunch's action was caused by a City policy,*

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[7] Indeed, Bunch contended at trial that he acted reasonably because he acted in conformity with his training and followed policy. The pretrial conference order poses one of the factual issues to be tried as "Whether defendant Officer Bunch reasonable [sic] believed that his use of the dog Volker in this case was in keeping with his training and thus reasonable and lawful." CR 39.

[8] As the trial court noted, Bunch would *not* be entitled to qualified immunity for either intentionally siccing the dog on Chew or for beating and kicking him while he was trying to surrender.

> *custom, or usage.* Second, he argues that regardless of the reasonableness of Officer Bunch's action in releasing the dog (given the alternatives then available to him), *the city's policy of training dogs such as Volker to apprehend unarmed and non-resistant suspects by biting, mauling, and seizing them was itself unreasonable and unconstitutional.*

Pet. App.A at A38-A39.[9] As the court of appeals noted, "[t]he district court held that the city was not liable under either theory for the bites inflicted by Volker because 'the manner in which the police dog was used did not, under the circumstances, infringe on his constitutional rights.' 744 F. Supp. at 956." Pet. App.A at A39. Accordingly, the court stated:

> Initially, we must determine whether the district court correctly concluded that Chew suffered no constitutional injury. Under Chew's first theory of municipal liability, whether a constitutional wrong was committed depends upon an assessment of the objective facts and circumstances bearing on the reasonableness of Officer Bunch's decision to release Volker. *The existence of a constitutional injury under Chew's second theory is not dependent on the lawfulness of Officer Bunch's conduct, but instead turns on the reasonableness of the city's general policy of training dogs to bite and seize all suspects.*

Pet. App.A at A40 [emphasis added].

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[9] The opinion reproduced in petitioner's appendix omits some of the foregoing passage. *See* Pet. App.A at A38-A39.

The court then went on to analyze the reasonableness of the seizure under *Graham v. Connor*, 490 U.S. 386 (1989). Weighing the factors articulated in *Graham* relating to the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight, and noting that the propriety of a particular use of force is generally an issue for the jury, the court concluded:

> When all disputes of fact are resolved in Chew's favor, as they must be for purposes of summary judgment, it is apparent that application of the *Graham* factors would *not* have *required* a rational jury to decide that using Volker to apprehend him was reasonable. Moreover, the district court's decision to take the excessive force question away from the jury conflicts with circuit law.

Pet. App.A at A46 [emphasis in original].[10] ***This holding has not been challenged in this petition.***

The court next found it necessary to consider whether the trial court's grant of summary judgment for the City could be affirmed on the ground that Chew's injuries did not result from the application or enforcement of an official city policy, as urged by the City, even though that issue was not addressed by the trial court. Pet. App.A at A63-A64. On this issue, the court held

> There is little doubt that a trier of fact could find that Chew's injury was caused by city

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[10] The reproduction of the opinion in petitioner's appendix omits the emphasis used by the court in its published opinion.

> policy. In the district court, the city conceded, for purposes of summary judgment, the truth of Chew's contention that departmental policy authorized seizure of *all* concealed suspects -- resistant or nonresistant, armed or unarmed, violent or nonviolent -- by dogs trained to bite hard and hold. Construing city policy as the appellee conceded we must, it doubtless could be found to be the "moving force" behind Chew's injury. Bunch released Volker because his superiors instructed him that he was to do so under the circumstances of Chew's case. The instructions are based on what we assume to be city policy. Accordingly, we must reverse the district court's grant of summary judgment in favor of the City of Los Angeles.

Pet. App.A at A66-A68 [footnote omitted]. ***The City does not take issue with this holding either.***

The court next concluded that, *accepting the City's argument that no jury could find that departmental canine policy was officially sanctioned*, liability could be found under the "deliberate indifference" formulation of *City of Canton v. Harris*, 489 U.S. 378, 388 (1989):

> In order to accept the city's contention that departmental canine policy was not officially sanctioned, we would have to find that the city itself had no policy regarding the use of canine force, or, at best, a policy of vesting complete discretion regarding the use of canines in the dogs' handlers. The record contains evidence that the dogs bit suspects in over 40% of the instances in which they were used. Where the city equips its police officers with potentially

> dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the cases in which they are used, a failure to adopt a municipal policy governing their use, evidences a "deliberate indifference" to constitutional rights. Under such circumstances, a jury could, and should, find that Chew's injury was caused by the city's failure to engage in any oversight whatsoever of an important departmental practice involving the sue of force.

Pet. App.A at A70-A72.

Finally, the court held that on remand, a jury could find that although the officer's on-the-scene decision to use canine force was reasonable under the circumstances, the City was nevertheless at fault for providing its officers with dogs trained to bite and seize all concealed suspects regardless of their efforts to surrender. Thus, if plaintiff could prove that training in less dangerous means of detection and apprehension was both feasible and effective, as the court noted the City's recent reversion to the "find and bark" policy suggests might have been the case, then the City's failure to so train its dogs "may well have constituted and unreasonable municipal action regarding the use of force." Pet. App.A at A72-A74.

REASONS FOR DENYING THE WRIT

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE MONELL ISSUE PRESENTED IN THE PETITION.

The petition seriously distorts the nature of the rulings below and the issues that were decided. The City states that the court of appeals "reversed a Summary Judgment in which

the [district court] had concluded that the City of Los Angeles' determination to employ police dogs to apprehend hiding suspects in built up areas, by seizing and biting if necessary, did not implicate the city's Monell liability." The district court determined no such thing. The motion for summary judgment raised, at best, only *one* issue concerning *Monell* liability: that the policy of using dogs to search for and seize felony suspects was "not clearly unconstitutional."[11] As pointed out by the court of appeals, the district court never reached *any Monell* issue, since it determined that there was no constitutional violation. On appeal, the defendants never even attempted to defend the district court's holding. Instead, the City raised all new theories as to *Monell* liability, arguing 1) that the constitutional violation was not *caused* by the City's policy, because it was an isolated incident for which the City could not be liable; 2) that there was "no evidence" of a policy that reflected a deliberate indifference to constitutional rights; 3) that the policy alleged in the complaint was not "policy" at all because it was not promulgated by an official "policy maker;" and 4) that the policy alleged was not the "practice" adopted in reality. *See* Appellees' Brief at i-ii.[12] The court of appeals deemed it necessary to address the issue of whether a jury could find that the policy *caused* the violation, and decided that it could. **That holding has not been**

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[11] In fact, the motion arguably did not even raise a *Monell* issue. It depends instead upon the argument that the defendants, including the City, were entitled to qualified immunity. The motion concludes with the statement, "This Motion . . . was brought on behalf of Daryl Gates, the City of Los Angeles, and Does 1 through 20 on the ground that the K-9 policy of the Los Angeles Police Department was not clearly unconstitutional, in good faith [sic] and consequently entitled to qualified immunity."

[12] The entire argument regarding the *Monell* issue raised here occupied barely more than a single page in the City's brief in the Court of Appeal. *See* Appellees' Brief at 32-33.

challenged here.

The City argues here only that the training of the dogs and their handlers is so careful and extensive that it cannot possibly be considered "deliberately indifferent." But the court of appeal never said that it could be. Indeed, the only mention of the "deliberately indifferent" standard in the opinion of the court below was in response to the *City's* attempt to disavow the concession it made in the trial court and argue that there was *no* policy regarding the use of dogs.[13] The court below concluded that the *lack* of any policy at all regarding the use of canine force *would* show deliberate indifference. But the City *did* concede that the training of its dogs was policy, and that concession is binding on the City. Therefore the issue of deliberate indifference was not essential to the court's decision, and there is not a sufficient presentation of the issue to warrant this Court's review.

The record also is inadequate for review of this issue. Because the issue was never raised in the trial court, no evidence was adduced with respect thereto, the trial court never considered any arguments with respect to this issue, and the record is not fully developed.

II. THE PETITIONER'S MONELL ARGUMENT HAS NO MERIT WITHOUT REGARD TO THE DECISION BELOW.

The City is simply wrong when it argues that this case turns on whether the City's training policy was "defective" or "insufficient." Plaintiff never claimed that the dogs were not *thoroughly* trained. Instead, plaintiff alleged that a policy

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[13] The City also persists, in this court, in mis-characterizing what the policy was, despite the concession made in the district court.

promulgated and implemented by the City resulted *directly* in a constitutional violation, *because* the dog and its handler acted *exactly* as trained. Thus *City of Canton v. Harris* has no application to the facts of this case. This is a straight *Monell* claim, where the policy is alleged to be the moving force behind the violation. *Monell* does not require a showing of deliberate indifference.

Furthermore, the court of appeals determined that the policy in this case could have been considered unconstitutional *on its face*, unlike the policy in *Harris*. If dogs which are capable of mauling human beings are trained to bite even non-resisting, non-dangerous suspects who pose no threat to the officer or others, then surely such a policy "implicates" the City's liability, just as would a policy which allowed police officers to use deadly force to apprehend fleeing suspects who pose no immediate threat to the safety of the officer or others. *See Tennessee v. Garner*, 471 U.S. 1 (1985).

III. THERE IS NO CONFLICT BETWEEN CIRCUITS WITH RESPECT TO THE QUESTION PRESENTED.

Petitioner attempts to create a conflict between this case and *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988). To begin with, the holding in *Robinette* has no bearing whatsoever on the question presented. In that rather unusual case, the Sixth Circuit held that a seizure by a police dog, which bit and killed a suspect caught in the act of committing a burglary in an enclosed building, at night, after he refused to come out despite warnings that a dog would be sent in, was not unconstitutional. Regardless of the soundness of that holding, Petitioner has not challenged the holding in *this* case that genuine issues of fact remain to be tried regarding the reasonableness of the seizure. The question of *Monell* liability, and especially the species of *Monell* addressed in the

petition, was simply not addressed in *Robinette*. Thus the "posture" of the Ninth Circuit, as presented in this petition, is simply not in conflict with *Robinette* at all.[14] If anything, *Robinette* is perfectly *consistent* with the decision in this case as it relates to the individuals who were entitled qualified immunity, and in fact it was the main authority relied upon by the court in holding that the officers were immune.

The facts of *Robinette* are also completely distinguishable from the instant case. *Robinette* occurred at nighttime, in an enclosed building, while a burglary was in progress. The court found *probable cause* to believe the suspect was a serious threat to the safety of the officers. By contrast, the search here took place in broad daylight, in a relatively open space, where at most it was known that there were outstanding warrants for Chew. As the court below noted, it was not known at the time what the warrants were for. The only "crime" in progress at the time was "resisting arrest," a misdemeanor.[15] There was also no reason to believe Chew posed any threat to the officers.

In any event, the "holding" which the defendants claim the decision in this case "rejects" is not a "holding" at all, but some unsupported *dicta* by the *Robinette* court. The statement which the defendants contend should have been

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[14] The City erroneously states that the majority "appear to reject" the decision in *Robinette*. Pet. at 48. The majority in this case did not do so — at least not the majority as the City defines it, i.e. Judges Reinhardt and Norris, who voted to reverse summary judgment. Rather, it was the majority of judges who voted to *affirm* the qualified immunity determination, Judges Reinhardt and Trott, who stated that it was doubtful that the court would have decided *Robinette* the same way. Pet. App.A at A81-A82.

[15] As the panel noted, Chew cannot be properly considered to have been "actively resisting" arrest in any event simply by hiding.

adhered to by the court in this case is:

> Indeed, instead of generally causing deadly force to be used to apprehend criminals, we believe that these dogs often help prevent officers from having to resort to, or be subjected to, such force. . . The use of dogs can make it more likely that the officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of the officers, bystanders and the suspect.

Robinette at 914.

From aught that appears in the opinion, there was no evidence in *Robinette* to support this "finding." There is certainly no evidence in *this* case to support such a dubious proposition. In fact, the City cannot point to one scintilla of empirical evidence from *any* source which supports such a finding. Indeed, common sense and the experience of canine handlers themselves show quite the opposite often occurs.

The whole notion that using a dog to bite improves officer safety results from the myth that dogs are effective against *armed* suspects. They are not. Nor can dogs discern the difference between dangerous and non-dangerous suspects. Dogs have no ability to reason. They have no judgment. They have no ability to understand what a criminal is, what a weapon is, or how dangerous a situation is, and any experienced dog trainer will concede these facts. It is for precisely these reasons that using dogs to bite hard and hold when they find a suspect, unless given a countermanding order, is likely to *increase* rather than decrease the risk to both officer and suspect, and even to innocent bystanders.

It is also untrue that *Robinette* was the "seminal

Section 1983 canine case" until now. In a case which *did* directly involve municipal liability, the Eleventh Circuit decided in *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989), that the trial court had improperly granted judgement n.o.v. in favor of the city and its former police chief, in a case involving the constitutionality of the use of police dogs. That case squarely implicated the constitutionality of the use of police dogs under *Monell* principles and *is* perfectly consistent with this case.

IV. THE MONELL QUESTION RAISES ONLY QUESTIONS OF FACT WHICH ARE UNIQUE TO THIS CASE AND DOES NOT INVOLVE A QUESTION OF NATIONAL IMPORTANCE.

The City argues that certain selected testimony establishes that the court of appeals erred in holding that there was sufficient evidence from which a jury could conclude that the City was liable. The City ignores the fact that a court reviewing an order granting summary judgment must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. At best, the City has shown that there were disputed issues of fact, which in and of itself is sufficient to defeat a motion for summary judgment.

In addition, contrary to what the City alleges, this case does not "challeng[e] the use of police dogs." It involves a very narrowly-defined policy regarding the use of dogs trained to attack and bite even unarmed, non-resistant human suspects who pose no immediate threat to the officer, whenever the dogs get out of sight of their handlers. This is not only a very fact-specific case, but a finding that an unconstitutional seizure resulted from such a policy would *not*, despite Petitioner's rhetoric, mandate the dismantling of all canine units in this country. Such contentions are pure

hyperbole. As shown in the opinion of the court of appeals, the experience of the City of Los Angeles itself belies such an assertion. Prior to the decision below, the City apparently had already returned to a "find and bark" policy, with no apparent upsurge in injuries to the police as a result. In all likelihood, the change has also resulted in a significant *decrease* in injuries to officers and suspects alike.

The Petitioner never explains why the issue raised herein is supposedly of "overriding national importance." Pet. at 42. While the general practice of using police dogs *might,* under certain circumstances, conceivably be considered a question of national importance, that is not the issue in this case. That practice *per se* is not challenged, and is not threatened in the least by the decision herein. All that the court below decided was that the reasonableness of the particular use of force in this case was for the jury to decide, as was the question of whether the policy in question caused the violation — hardly startling propositions, and certainly not so novel as to warrant review by this Court.

V. THE SATISFACTION OF THE JUDGMENT AGAINST THE OFFICER DOES NOT BAR THE MONELL CLAIM.

The Petitioner mis-states both the law and the facts in claiming that the satisfaction of the judgment by the City forecloses plaintiff from further relief. Contrary to what Petitioner claims, plaintiff did not sue the City and the officer for the "same underlying incident." Pet. at ii. He sued each for *separate and distinct constitutional wrongs.* As the court of appeals held, Bunch's liability could have been based either on his use of the dog, whether pursuant to policy or not, or on his attack on plaintiff with his feet and baton. The City could only have been liable for the dog bites, and only on the basis of the policy. It is most emphatically untrue that there was "only one controversy here," i.e. the release of the

dog. Whether the release of the dog was the "central focus" or not, there was clearly a controversy at trial over whether Bunch caused "various cuts" to plaintiff's head by kicking him and striking him with the baton "a number of times." CR 39. The pretrial order sets forth distinct issues of fact and law to be resolved regarding whether the dog attack was unreasonable and whether Bunch's own use of force was unreasonable. It is patently false for the City to assert that there was only a single "kick" upon which the jury could have based its verdict if it was not based on the dog bites. Pet. at 55. Such an assertion is refuted by the very pretrial order the City signed. CR 39.

Nor is it true that plaintiff was the "presumed recipient of a judgment for all damages under Section 1983." Pet. at 53. This statement is contrary to the law as applied by the court of appeals which states just the *opposite*, i.e. that it must be presumed, for collateral estoppel purposes, that plaintiff was *not* compensated for the dog bites. Pet. App.A at A30-A31. As shown by the court below, the *City* has the burden of showing issue preclusion. *Id.* at A28-A29. The plaintiff does not have the burden of proving that the doctrine does not apply. Petitioner has cited no law to the contrary, but nevertheless claims it is "unfair" *not* to put the burden on plaintiff "to establish the basis for his judgment." Petitioner cites absolutely no authority why that should be the rule, or which casts any doubt on the long-settled rule applied by the court of appeal. Since this issue involves, therefore, only well settled principles of law, which were correctly decided, there is no reason for the Court to undertake review.

The City's criticism of plaintiff for failing to seek "clarification" of the basis of liability in the district court is entirely misplaced. Plaintiff appealed a grant of summary judgment; it was the City that raised the issue of collateral estoppel. If anyone knew the issue was going to arise, therefore, it surely would have been the City (which was

represented by the same counsel as Bunch). The onus was on the attorney representing both the City and Bunch to request a special verdict which clearly distinguished between the different bases of liability affecting each of his clients.[16] It was certainly not plaintiff's responsibility to do so. Even further afield is the contention that plaintiff should have ordered the trial transcript. If defendants wished to raise the preclusive effect of the judgment against Bunch as a bar to the appeal, it was surely within their ability to order a transcript and make it part of the record on appeal. They chose not to do so.

It is by no means clear, as the City asserts, that the plaintiff was in fact compensated for *all* his damages. Contrary to what the City asserts, that is *not* what the jury was instructed to do. Rather, it was told that it "may award him only such damages as will reasonably compensate him for such injury and damages as you find, from a preponderance of the evidence in the case, that he has suffered as a proximate result of the accident [sic]." CR 68, Instruction No. 47. What resulted from the "accident" could clearly be either the dog attack or the attack by Bunch. At this point it is simply impossible to determine which the jury had in mind (or even whether all jurors based their verdict on the same acts).

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[16] The City did, in fact, request a special verdict, but it asked only 1) "Did plaintiff have a constitutional right that was violated," 2) "Did Officer Bunch act reasonably, as a reasonable officer on the scene would, and faced with the same circumstances as he was," and 3) "Did Officer Bunch deliberately order his dog to attack or personally assault the plaintiff with full knowledge
that it was unnecessary." CR 48. The form was not used, probably because it did not incorporate the correct legal principles, but it is apparent that if it had been used, an affirmative answer to the last question would have served only to inextricably confound the two possible bases for liability.

The City's *assumption* that the jury could not have awarded $13,000 damages for a "kick in the head" is totally unwarranted. There were clearly both multiple kicks and blows from the baton which could have provided the basis for the jury's award. In fact, it makes much more sense to conclude that in awarding so little, the jury did in fact award solely for the kicks and blows and resulting cuts on the head. The evidence clearly showed that the plaintiff's arm was nearly severed. Surely, if the jury had warded damages for such an injury, it would have awarded much more than $13,000.

VI. THIS CASE IS NOT APPROPRIATE FOR RESOLVING THE QUESTION OF WHEN CLAIM PRECLUSION WOULD BAR A MONELL CLAIM.

The City attempts to portray this case as one which is appropriate for the Court to determine "when and under what circumstances a potential *Monell* cause of action will be barred by the satisfaction of the judgment in the underlying individual Section 1983 action." Petition at 55-56. Even assuming the question were of sufficient import, there clearly is no reason for the Court to undertake review of *this* case, with its unique circumstances, in order to set out general rules regarding when such satisfaction of judgments would bar *Monell* actions. On the one hand, it is clear that in the class of cases which the City describes, and in which it incorrectly places this particular case, there is no reason for a Supreme Court pronouncement on the issue. It is an exceedingly simple issue. If the plaintiff is compensated for all his injuries, then obviously there is no reason to proceed against the City or any other entity on *any* claim arising out of the same injury. On the other hand, if a case presents unique circumstances, as does this case, such that a claim against one defendant is not barred by the satisfaction of the judgment against the other, then surely it is not a proper forum for

announcing any general rules.

A pronouncement such as the City seeks is not necessary for resolution of this case, and would necessarily be based on theoretical situations not presented here. Furthermore, the decision by the court of appeals in this case was manifestly *correct,* thereby foreclosing any need for this Court to review that decision. All in all, the city never explains why this is a question of national importance which cries out for resolution by this Court.

The city also attempts to persuade this Court to review this case by describing the district court case upon which the city relies as "controversial." *See Sanchez v. City of Riverside*, 596 F. Supp. 193 (C.D. Cal. 1984). Pet. at 56. What the City does not point out is that *Sanchez* was all but disapproved by the Ninth Circuit in *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991). In *Larez*, as here, the court determined that the plaintiff could proceed to trial against the remaining defendants, because the basis of their liability was different from that of the officer on behalf of whom the judgment had already been satisfied. Unlike this case, however, in *Larez* the plaintiff was only entitled to nominal damages. Here, as the court below concluded, *actual* damages are available as well. Even if sound, *Sanchez* is easily distinguished because in that case there was only one injury alleged. That is clearly not the case here.

CONCLUSION

The questions presented by the City for resolution by this Court do not fairly reflect what was considered by the district court and the court of appeals below and are not questions of such national importance as to require resolution by this Court. There is no conflict in the circuits with respect to the *Monell* issue, which is not adequately raised by the decision below or by the record. The issues presented, to the

extent they were considered by the court below, were manifestly correctly decided and are limited to the facts of this case. Therefore, the Court should deny the Petition for Writ of Certiorari.

Dated: January 20, 1995

Respectfully submitted,
GEORGE V. DENNY III
Counsel of Record

RALPH J. LEARDO
Attorneys for Respondent